Sheet Metal Workers International Association, Local Union 28, AFL–CIO *and* American Elgen and Sheet Metal and Air Conditioning Contractors Association of New York City Inc. and SMACMA of Long Island, Inc., Parties to the Contract. Case 2–CE–155

March 31, 1992

ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On July 1, 1991, the Regional Director for Region 2 issued a complaint and notice of hearing in the above-entitled proceeding alleging violation of Section 8(e) of the National Labor Relations Act based on Respondent's enforcement of hot cargo agreements with the parties to the contract with the object of forcing or requiring those employers to cease doing business with the Charging Party.

A hearing opened before Administrative Law Judge Raymond P. Green on December 9, 1991. As a result of Respondent counsel's illness, the hearing was adjourned to December 27, 1991, without any evidence being introduced. When the hearing resumed on December 27, 1991, counsel for the General Counsel moved to withdraw the complaint, advising that, on the basis of information obtained in her investigation of the unfair labor practice charge, including evidence relevant to the Respondent's work preservation defense obtained after issuance of the complaint from previously uncooperative witnesses, she had concluded that further prosecution was not warranted. Charging Party opposed the motion to withdraw on two grounds: (1) the Charging Party has a different theory of the case and (2) Charging Party asserts that it is not privy to the new evidence relied on by the General Counsel and wishes to assure itself that such new evidence is true and correct.

By order dated January 27, 1992, Judge Green denied the General Counsel's motion. In his order Judge Green noted that had the complaint been withdrawn prior to opening of the hearing, the General Counsel's action would have been nonreviewable under Section 3(d) of the Act.[1] However, although no evidence had been received, Judge Green held that because the hearing had opened, any final order is reviewable by the Board and the courts, that the administrative law judge must either grant or deny the motion to withdraw, exercising his or her discretion in so doing, and that the exercise of discretion ''requires at least some degree of independent fact finding and cannot be based on a blind reliance on facts as represented by one side only.'' At the same time, however, Judge Green concluded that a full evidentiary hearing is not required. Rather, Judge Green ordered the General Counsel to ''turn over to me, to the Charging Party and to the Respondent no later than February 11, 1992, any nonprivileged statements given by contractors which were relied on as the basis for the General Counsel's motion to withdraw the complaint.''

On February 4, 1992, the General Counsel filed a request for special permission to appeal an order of the administrative law judge.[2] The General Counsel contends that the postcomplaint investigation of the Respondent's work preservation defense establishes that a majority of the disputed work has been historically fabricated by members of the parties to the contract and that General Counsel would not be justified in continuing to prosecute the complaint. Therefore, the General Counsel requests the Board to reverse the judge's ruling and order him to grant the motion to withdraw the complaint and dismiss the charge.

On February 10, 1992, the Charging Party filed an opposition to the General Counsel's appeal. The Charging Party argues that the judge's order constitutes a reasonable exercise of his discretion which accommodates the General Counsel's interest in preserving the confidentiality of her file, the administrative law judge's duty to evaluate the merits, and the Charging Party's right to respond to the General Counsel's motion. Charging Party further contends that the General Counsel's argument that the judge's order supersedes the General Counsel's investigatory and prosecutorial authority ''is intellectually dishonest'' because the General Counsel has conceded that once the record has opened, the decision to withdraw a complaint no longer lies within the General Counsel's exclusive authority.[3]

For the following reasons, we conclude that the General Counsel has unreviewable discretion—i.e., discretion is not subject to either Board or court review—to withdraw a complaint after the hearing on it has opened but before any evidence has been introduced, at least so long as there is no contention that a legal issue is ripe for adjudication on the parties' pleadings alone.

[1] Judge Green relied on *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112 (1987).

[2] Pursuant to counsel for the General Counsel's request, Judge Green stayed his order pending Board consideration of the General Counsel's appeal. On February 20, 1992, the Board issued an unpublished order vacating the administrative law judge's order and directing him to grant the General Counsel's motion to withdraw the complaint. The Board's order further advised that a fully articulated decision would follow.

[3] The Respondent filed a brief in support of the General Counsel's appeal, contending, inter alia, that Sec. 3(d) of the Act vests the General Counsel with ''final authority'' regarding the filing, investigation, and ''prosecution'' of complaints, that since no evidence was introduced, authority to withdraw the complaint lies with the General Counsel, and that under Sec. 102.19 of the Rules and Regulations any appeal is to the General Counsel in Washington, not the Board.

Section 3(d) of the Act vests the General Counsel with ''final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10'' of the Act and ''in respect of the prosecution of such complaints before the Board.'' It is settled that under a reasonable reading of Section 3(d), the General Counsel possesses unreviewable ''final authority'' that includes not only authority to decide whether to issue unfair labor practice complaints, but also, in some circumstances, authority extending beyond the point at which a complaint is issued. *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 122–123, 125–126 (1987). That authority includes a purely ''prosecutorial'' decision to withdraw a complaint, i.e., effectively a dismissal. Id. at 125–126 (authority to dismiss complaint pursuant to prehearing informal settlement); *George Banta Co. v. NLRB*, 626 F.2d 354 (4th Cir. 1980), cert. denied 449 U.S. 1080 (1981) (in context of prehearing informal settlement, authority to dismiss a complaint allegation on grounds that investigation failed to provide sufficient supporting evidence).

At some point, however, a complaint may be said to have advanced so far into the adjudicatory process that a dismissal takes on the character of an adjudication, and at that point the General Counsel no longer possesses unreviewable authority in the matter. Thus, the Board has held that ''where . . . relevant evidence has been adduced at a hearing, the General Counsel no longer retains absolute control over the complaint; and a subsequent motion to dismiss the complaint or any portion thereof is within the [administrative law judge's] discretionary authority.'' *General Maintenance Engineers*, 142 NLRB 295 (1963) (footnote omitted). Accord: *United Aircraft Corp*., 91 NLRB 215 (1950). See also *Graphic Communications Workers (Mueller Color)*, 230 NLRB 1219 fn. 4 (1978) (midhearing grant of General Counsel's motion to withdraw complaint on the ground of an interim change in Board law approved as an action within the administrative law judge's discretion).

The exact dividing line is not made plain in the text of the Act. As the Supreme Court noted in *Food & Commercial Workers*, although some decisions ''can be said with certainty to fall on one side or the other'' of the ''prosecutorial and adjudicatory line,'' others come within a middle range ''that might fairly be said to fall on either side of the division.'' 484 U.S. at 125. Without purporting to decide where the line is to be drawn in all circumstances, we hold that where, as here, (1) a hearing has opened, (2) the General Counsel seeks to withdraw complaint allegations because he believes the evidence obtained in the investigation does not, taken as a whole, support the allegations, and (3) counsel for the General Counsel has not introduced evidence in support of the allegations (i.e., the *evidentiary* hearing has not effectively commenced), the General Counsel retains unreviewable authority under Section 3(d) to withdraw the complaint allegations in question. This is the conclusion we reached in a previous case decided in an unpublished order that was upheld upon review,[4] and we reach the same conclusion here. Furthermore, because such a decision to withdraw complaint allegations is within the General Counsel's unreviewable ''final authority'' under Section 3(d), we find no basis for permitting the Charging Party or the judge to compel the General Counsel to produce her investigatory file for review of her decision not to continue the prosecution of those allegations. Just as the Ninth Circuit observed in *Boilermakers Local 6 v. NLRB*, supra at 334, regarding an attempt to compel the General Counsel to introduce evidence at the hearing in support of the allegations or to allow the charging party to produce the evidence, we find that such an intrusion ''must either severely compromise the prosecutorial independence of the General Counsel or in effect convert the proceeding into a two-party private litigation'' (between the respondent and the charging party).

In summary, where, as here, the hearing has opened but no evidence has been introduced, discretionary authority to withdraw the complaint lies with the General Counsel. Accordingly,

IT IS ORDERED that the General Counsel's request for special permission to appeal is granted, and the administrative law judge's ruling is vacated, the General Counsel's motion to withdraw the complaint is granted, and the above-entitled proceeding is remanded to the Regional Director for Region 2 for further appropriate action consistent with this Order.

[4] *Solano Rail Car Co*., Case 20–CA–20941, unpublished order issued October 27, 1987, petition for review denied *Boilermakers Local 6 v. NLRB*, 872 F.2d 331 (9th Cir. 1989).